

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA**

CHIEFTAIN ROYALTY COMPANY,)

Plaintiff,)

v.)

Case No. CIV-11-29-KEW

XTO ENERGY INC.,)

Defendant.)

**MEMORANDUM OF LAW IN SUPPORT OF CLASS REPRESENTATIVE'S MOTION
FOR APPROVAL OF CASE CONTRIBUTION AWARD**

I. SUMMARY OF THE ARGUMENT

In connection with Class Representative Chieftain Royalty Company's request for approval of the Settlement¹ in the above-captioned Litigation, Class Representative ("Chieftain") respectfully moves the Court for a Case Contribution Award of \$225,000.00 from the Gross Settlement Fund, as compensation for its valuable time, effort and assistance throughout this Litigation, which culminated in a Settlement with a total value of at least \$214.750 million.² This award is proportional to the contribution of Chieftain and is supported by the declaration submitted by its President, Robert Abernathy, demonstrating its time and effort and also the risk and burden it incurred. *See* Declaration of Robert Abernathy President of Chieftain Royalty Company ("Chieftain Decl."); *see also* Declaration of Geoffrey P. Miller in Support of the Settlement Agreement, Certification of the Settlement Class for Settlement Purposes, Class Counsel's Application for Attorneys' Fees, Reimbursement of Litigation Expenses, Class Representative's Request for Case Contribution Award, and Notice Of Proposed Settlement ("Miller Decl.") (Docket No. 206); Affidavits of Dan Little; Clear Fork Minerals, LLC; Michael P. Starceovich; Michael J. Weeks (on behalf of three class members: Pagosa Resources, LLC; Legacy Royalty, LLC; and Michael J. Weeks Revocable Trust); Clear Energy, Ltd.; Allen Tim Meyer Trustee of the Allen Tim Meyer Revocable Trust; *see Reiridon v. XTO Energy Inc.*, Case No. 6:16-cv-00087-

¹ All capitalized terms not otherwise defined herein shall have the meanings given to them in the Settlement Agreement dated November 20, 2017 (the "Settlement Agreement"), a copy of which was attached as Exhibit 1 to Plaintiff's Memorandum of Law in Support of Plaintiff's Motion to Certify the Settlement Class for Settlement Purposes, Preliminarily Approve Class Action Settlement, Approve Form and Manner of Notice and Set Date for Final Approval Hearing ("Preliminary Approval Memorandum") (Dkt. No. 197).

² *See* Affidavit of Barbara A. Ley ("Ley Affidavit"), attached as Exhibit 3 to Class Representative's Memorandum of Law in Support of Class Representative's Motion for Final Approval ("Final Approval Memorandum"), at ¶6.

KEW (E.D. Okla. Jan. 29, 2018), Order Awarding Case Contribution Award (Dkt. No. 126) (“*Reirdon* Case Contribution Award Order”).

Therefore, and for the reasons below, Chieftain respectfully requests the Court grant its Motion for Approval of Case Contribution Award (the “Motion”).

II. FACTUAL AND PROCEDURAL SUMMARY

In the interest of brevity, Chieftain will not recite the factual and procedural background of this Litigation again herein. Instead, Chieftain respectfully refers the Court to the Preliminary Approval Memorandum, the Final Approval Memorandum, the Declaration of Bradley E. Beckworth, Patranell Lewis and Rex A. Sharp on Behalf of Class Counsel, the Miller Declaration, the pleadings and other motions on file, and any other matters of which the Court may take judicial notice, all of which are respectfully incorporated by reference as if set forth fully herein.

III. ARGUMENT

In recognition of the time, effort, risk and burden Chieftain incurred to produce such a significant result for the Settlement Class, Chieftain seeks a case contribution award of \$225,000.00 from the Gross Settlement Fund (the “Case Contribution Award”). As demonstrated below, this request is fair, reasonable and adequate and, therefore, should be granted.

A. **The Parties Have Agreed Federal Common Law Controls the Case Contribution Award**

The Parties here contractually agreed that the Settlement Agreement shall be governed *solely* by federal common law with respect to certain issues, including the case contribution award:

To promote certainty, predictability, the full enforceability of this Settlement Agreement as written, and nationwide application, the Parties agree that this Settlement Agreement shall be ***governed solely by any federal law*** as to due process, class certification, judgment, collateral estoppel, res judicata, release, settlement approval, allocation, ***case contribution award***, the right to and reasonableness of attorneys’ fees and expenses, and all other matters for which there is federal procedural or common law, including federal law regarding federal

equitable common fund class actions. For any such matters where there is no federal common law, Oklahoma state law will govern.

Settlement Agreement at ¶11.8.

Under Oklahoma choice of law principles, this choice of law should be enforced. *See Reirdon Case Contribution Award Order* at ¶6(e); *see also Leritz v. Farmers Ins. Co.*, 2016 OK 79, ¶1, 385 P.3d 991, 992 (“Generally, [t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied . . .”); Miller Decl. at ¶¶41-44.

Put simply, litigants are free to select the choice of law that will govern decisions regarding interpretation and enforcement of a settlement agreement and all matters relating thereto. Here, in light of the fact that this is a multi-state class action, governed by Federal Rule of Civil Procedure 23, and a case over which this Court has jurisdiction because of the application of the Class Action Fairness Act, the parties contractually chose to apply federal common law to all matters regarding the reasonableness and fairness of the settlement, including but not limited to, the issue of any Class Representative incentive award. *See Settlement Agreement* at ¶11.8; *Reirdon Case Contribution Award Order* at ¶¶6(d)-(f). This contractual agreement is consistent with Oklahoma choice of law principles. *See, e.g.*, Miller Decl. at ¶¶41-44.

B. The Case Contribution Award Is Reasonable Under Federal Common Law

Federal courts regularly grant incentive awards to compensate named plaintiffs for the work they performed on behalf of the class—their time and effort invested in the case. *See Reirdon Case Contribution Award Order* at ¶6(f); *see also, e.g., UFCW Local 880-Retail Food v. Newmont Mining Corp.*, 352 Fed. Appx. 232, 235 (10th Cir. 2009) (“Incentive awards [to class representatives] are justified when necessary to induce individuals to become named representatives...Moreover, a class representative may be entitled to an award for personal risk

incurred or additional effort and expertise provided for the benefit of the class.”);³ *Chieftain Royalty Co. v. Laredo Petro., Inc.*, No. CIV-12-1319 (W.D. Okla. May 13, 2015) (Docket No. 52) (“*Laredo Fee Order*”) at 9 (case contribution awards are meant to “compensate class representatives for their work on behalf of the class, which has benefited from their representation.”) (citing *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. 2010)); *Fankhouser v. XTO Energy, Inc.*, No. CIV-07-798-L, 2012 U.S. Dist. LEXIS 147197, at *9-10 (W.D. Okla. Oct. 12, 2012) (granting incentive awards totaling \$100,000 from \$37 million fund); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006) (granting incentive awards equaling \$15,900,000, or 1.5% of \$1.06 billion fund, to be split amongst nine class representatives and stating “[t]here is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action.”); *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 WL 1221350, at *18-19 (E.D. Pa. June 2, 2004) (finding “ample authority in this district and in other circuits” for total incentive awards of \$125,000); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) (“Incentive awards are not uncommon in class action litigation and particularly where . . . a common fund has been created for the benefit of the entire class.”); *Enter Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240 (S.D. Ohio 1991) (awarding \$300,000 in incentive awards to class representatives, equaling .93% of current cash portions of settlement and approximately .53% of estimated present value); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366,

³ *Newmont* held the district court did not abuse its discretion in denying an incentive award to a *pro se* objector because: (i) his objections did not confer a benefit on the class, (ii) he did not incur any risk, “nor could he, since his participation as an objector began after a settlement was reached and a common fund was created” (*id.* at 236), and (iii) his objections to class counsel’s attorneys’ fees were “general and lacking in meaningful analysis” (*id.* at 237).

373-74 (S.D. Ohio 1990) (granting \$215,000 in incentive awards from \$18 million fund); *Cobell v. Salazar*, 679 F.3d 909, 922-23, (D.C. Cir. 2012) (district court did not err in finding that lead plaintiff’s “singular, selfless, and tireless investment of time, energy, and personal funds to ensure survival of the litigation [merited] an incentive award”); *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (“Incentive awards . . . are intended to compensate class representatives for work done on behalf of the class . . .”).

Last year, the Tenth Circuit issued an opinion in *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 861 F.3d 1182 (10th Cir. 2017), in which the Tenth Circuit reversed and remanded a district court order that granted an incentive award to the class representative to be paid out of the common fund, finding that the record did not contain sufficient evidence to support the percentage incentive award in that case of 0.5%. The plaintiff-appellee in *EnerVest* has filed a Petition for Rehearing *En Banc*, which remained pending as of the date of this filing. The Petition for Rehearing *En Banc* was overwhelmingly supported by seven *amici* briefs filed by: (1) The Chickasaw Nation and the Choctaw Nation; (2) Arthur R. Miller, co-author of the leading treatise, *Wright & Miller*; (3) the Oklahoma Law Enforcement Retirement System; (4) Provident Energy, Ltd.; (5) the Honorable Richard G. Van Dyck and Drew Edmondson; (6) absent class members Kelsie Wagner, trustee of the Kelsie Wagner Trust; Patrick Cowan, owner of CSW 2003 Exploration Limited Partnership and Trustee of the Asa R. Maley Revocable Living Trust; Roger Brown, owner of Omega Royalty Company, LLC; and (7) Professor Charles Silver of the University of Texas Law School.

Regardless of the ultimate outcome in *EnerVest*, the opinion is wholly inapplicable here because that case dealt with the application of state law choice of law principles while the parties here, unlike in *EnerVest*, contractually agreed that federal common law controls the case

contribution award. *See Reirdon Case Contribution Award Order* at n.1; Miller Decl. at ¶46. Moreover, although incentive awards can be percentage-based or dollar-based,⁴ Chieftain seeks an award based on its hours spent times a reasonable rate, and not a percentage-based award, as was requested and awarded by the district court in *EnerVest*.⁵ *See Reirdon Case Contribution Award Order* at n.1.

The services for which incentive awards are given typically include “monitoring class counsel, being deposed by opposing counsel, keeping informed of the progress of the litigation, and serving as a client for purposes of approving any proposed settlement with the defendant.” *Reirdon Case Contribution Award Order* at ¶6(g) (quoting Newberg § 17:3). The award should be proportional to the contribution of the plaintiff. *Id.* (citing *Phillips v. Asset Acceptance, LLC*, 736

⁴ *EnerVest* noted that “the weight of authority apparently disfavors percentage-based awards.” 861 F.3d at 1196. However, Oklahoma federal and state courts routinely award percentage-based incentive awards. *See, e.g., Reirdon Case Contribution Award Order* at ¶6(n); *Laredo Fee Order* at 10 (finding a 1% case contribution award “to be fair and reasonable”); *EnerVest*, 861 F.3d at 1196 (recognizing that a percentage calculation can be used to check an award for excessiveness by reference to the percentage of the fund it represents).

⁵ Moreover, even under *EnerVest*—which cited and relied upon studies by Chieftain’s expert here, Professor Geoffrey P. Miller—incentive awards are still viable, and in fact, are “not uncommon.” 861 F.3d at 1192 (citing Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303 (2006)). There, the Tenth Circuit (1) rejected a claim that incentive awards evidence a conflict of interest (*id.* at 1196, n.7) and (2) rejected the idea that a relationship with counsel evidences some type of impermissible conflict (*id.* at 1191, n.5). Also, even though the Tenth Circuit applied Oklahoma state law to determine the appropriate amount of the incentive award, it recognized a “marked increase in the frequency of incentive awards, with the rate approaching 80% by 2011.” *Id.* at 1192 (citing Newberg § 17:7). The Tenth Circuit further noted the average award was \$11,697 and the median award was \$5,250 in a study of cases from 2006 to 2011. *Id.* (citing Newberg § 17:8). In applying Oklahoma state law in *EnerVest*, the Tenth Circuit did not find that the amount awarded by the district court was unsupportable on its face; instead, it simply held that more evidence of the class representative’s time and rate was required. *Id.* at 1196-97. Moreover, the Tenth Circuit did not hold that percentage-based incentive awards are never allowed. And, the Tenth Circuit relied on federal common law (e.g., *Cobell v. Salazar*, 679 F.3d 909, 922-23 (D.C. Cir. 2012)) because the Court found “Oklahoma Supreme Court has not addressed incentive awards nor have we been directed to or found any opinions by lower courts of that state.” *Id.* at 1195-96. As such, the result under federal common law or Oklahoma state law is likely the same.

F.3d 1076, 1081 (7th Cir. 2013) (if the lead plaintiff's services are greater, her incentive award likely will be greater); *Rodriguez*, 563 F.3d at 960 (incentive award should not be "untethered to any service or value [the lead plaintiff] will provide to the class"); Newberg § 17:18).

Here, Chieftain seeks a modest award of \$225,000.00. This request is supported by the evidence submitted by Chieftain, including its own declaration, the Miller Declaration, and the affidavits of numerous absent class members. *See, e.g., Reirdon Case Contribution Award Order* at ¶6(h) (citing Newberg § 17:12 (evidence might be provided through "affidavits submitted by class counsel and/or the class representatives, through which these persons testify to the particular services performed, the risks encountered, and any other facts pertinent to the award.")). This evidence demonstrates Chieftain devoted at least 750 hours to this Litigation and expended approximately \$4,000 in out-of-pocket expenses and is seeking payment at a reasonable hourly rate for reasonable time expended on services that were helpful and non-duplicative to the litigation. *See* Chieftain Decl. at ¶¶7-13, 18-19; *see also Reirdon Case Contribution Award* at ¶6(h).

Chieftain's President and Founder, Mr. Abernathy, attended Tulane University, graduated from the University of Oklahoma with a B.A., and received a Juris Doctorate from Oklahoma City University School of Law. Chieftain Decl. at ¶4. Mr. Abernathy is licensed to practice law in Oklahoma, where he has practiced for 25 years, specializing in oil and gas, real estate, bankruptcy and probate law. *Id.* Mr. Abernathy is a nationally recognized speaker on royalty ownership issues. *Id.* Over the past 11 years, he has given speeches to thousands of mineral interest owners around the country on all aspects of mineral ownership including estate planning and Oklahoma Corporation Commission rulings and regulations. *Id.* He is a former board member of the National Association of Royalty Owners (NARO) and president of the Oklahoma chapter, and also a

founding member of the American Royalty Council. *Id.* In addition, he is a co-founder and Manager of Acorn Royalty Company, which is active in the SCOOP and STACK plays in Oklahoma. *Id.* Mr. Abernathy also is a shareholder and Vice President of ELM III, LLC, which owns and operates oil and gas wells in southwest Kansas and the Oklahoma panhandle, including commercial salt water disposal wells. *Id.* And, he actively manages a real estate and ranching business. *Id.* In short, Mr. Abernathy is an experienced businessman, attorney and advocate for royalty and mineral interest owners, who, on behalf of Chieftain, provided substantial insight and expertise regarding the oil and gas industry to the prosecution of this Litigation. *See id.* at ¶¶4-5, 7-13, 18-20; *see also* Miller Decl. at ¶¶93-95.

As demonstrated by its Declaration, both the time and efforts that Chieftain dedicated to advancing the Class' interests in this Litigation are reasonable. Specifically, Chieftain has dedicated approximately 750 hours to this Litigation. Chieftain Decl. at ¶18. These hours were spent searching for and collecting documents for production, reviewing emails and draft pleadings from Class Counsel, consulting and/or meeting with Class Counsel and experts, traveling to and from meetings, hearings and mediations, attending mediations, and reviewing and discussing settlement documents, preliminary approval documents, and final approval documents. *Id.* at ¶¶8, 10, 18. All of these efforts were necessary and beneficial to the Litigation and the ultimate Settlement. And, Chieftain will continue to work on behalf of the Settlement Class in the coming weeks and months, including through the Final Fairness Hearing and, if approved, assisting with administration of the Settlement. *Id.* at ¶19. This will add at least an additional 25 hours that Chieftain will dedicate to this Litigation. Chieftain will also incur additional time in the event of an appeal, conferring with Class Counsel and reviewing additional pleadings. However, even if Chieftain never worked another hour on this case after the Final Fairness Hearing, it will have

dedicated at least 750 hours to this Litigation, and the request of \$225,000 would come out to a reasonable and modest hourly rate of \$300.

Indeed, Chieftain was heavily involved in all aspects of the Litigation, even prior to the filing of the Petition in December 2010. *Id.* at ¶¶7-10. Chieftain actively and effectively fulfilled its obligations as a representative of the Settlement Class, complying with all reasonable demands placed upon it during the prosecution and settlement of this Litigation, and provided valuable assistance to Class Counsel. *Id.* at ¶18. Chieftain has worked with Class Counsel since before the inception of this Litigation, and his active participation has contributed significantly to the prosecution and resolution of this case. *Id.* at ¶¶7-12. In addition, Chieftain produced documents, reviewed pleadings, motions and other court filings, communicated regularly with Class Counsel, reviewed expert analysis on damages, attended two formal mediation sessions in person, and actively participated in the negotiations that led to the settlement of this Action. *See id.*; *see also* Joint Class Counsel Declaration at ¶¶96-102. Chieftain also spent time communicating with one of Class Counsel's experts regarding the settlement and approval process and procedure. Miller Decl. at ¶¶69, 94.

Chieftain was never promised any recovery or made any guarantees prior to filing this Litigation, nor at any time during the Litigation. Chieftain Decl. at ¶20. In fact, if the Court determines that no award is appropriate, Chieftain understands and agrees that such an award, or rejection thereof, has no bearing on the fairness of the Settlement and that it will be approved and go forward no matter how the Court rules on its request. *Id.* In other words, Chieftain fully supports the Settlement as fair, reasonable and adequate, even if it is awarded no case contribution award at all. *Id.* Chieftain has no conflicts of interest with Class Counsel or any absent class member. *Id.* Finally, several absent Class Members executed affidavits supporting Chieftain's request for a

Case Contribution Award. *See* Affidavits of Dan Little; Clear Fork Minerals, LLC; Michael P. Starcevich; Michael J. Weeks (on behalf of three class members: Pagosa Resources, LLC; Legacy Royalty, LLC; and Michael J. Weeks Revocable Trust); Clear Energy, Ltd.; Allen Tim Meyer Trustee of the Allen Tim Meyer Revocable Trust.

Because Chieftain has dedicated its time, attention and resources to this Litigation, it is entitled to the requested Case Contribution Award. *See* Joint Class Counsel Decl. at ¶¶96-102. Chieftain respectfully requests the Court award it a Case Contribution Award of \$225,000.00 to reflect the important role that it played in representing the interests of the Settlement Class and in achieving the substantial result reflected in the Settlement.

C. The Case Contribution Award Is Reasonable Under Oklahoma State Law Even if *EnerVest* Were Applicable

Even if this Court decided not to enforce the Parties' express agreement that federal common law controls the case contribution award and apply Oklahoma state law instead, Oklahoma law strongly supports incentive awards, particularly in royalty underpayment class actions such as this. *See, e.g., Reirdon* Case Contribution Award Order at ¶¶6(n)-(o); Miller Decl. at ¶95. In fact, Oklahoma state courts routinely grant percentage-based incentive awards to class representatives, which historically are much larger than the modest amount sought here. *See Reirdon* Case Contribution Award Order at ¶6(n); *see also Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.*, No. CJ-2010-38, 2015 WL 5794008, at *9 (District Court of Beaver County, Oklahoma July 2, 2015) (granting incentive award of 3/10th of 1% of \$119 million cash portion of settlement, or just over \$350,000.00, and finding “[t]he incentive award sought is consistent with such awards in other cases. Oklahoma courts have typically awarded class representatives in royalty owner class actions approximately 1-2% of the settlement. . . . [Collecting cases] . . .”); *Velma-Alma Indep. Sch. Dist. No. 15, v. Texaco, Inc.* No. CJ-2002-304, District Court of Stephens

County, Oklahoma (2005) (awarding 1-2% of total settlement amounts); *Robertson v. Sanguine, Ltd.*, No. CJ-02-150, District Court of Caddo County, Oklahoma (2003) (awarding 1% class representative fee); *Continental Resources, Inc. v. Conoco, Inc.*, No. CJ-95-739, District Court of Garfield County, Oklahoma (2005) (“Court awards to Class Representatives of 1% of the common fund are typical in these types of actions, with some awards approaching 5% of the common fund.”).

As such, Chieftain’s request for an incentive award of \$225,000.00 is fair and reasonable under Oklahoma state law for the same reasons it is fair and reasonable under federal common law and supported by the same evidence of reasonableness. *See Reirdon Case Contribution Award Order* at ¶6(o); *see also generally* Chieftain Decl.; Miller Decl.; Affidavits of Dan Little; Clear Fork Minerals, LLC; Michael P. Starcevich; Michael J. Weeks (on behalf of three class members: Pagosa Resources, LLC; Legacy Royalty, LLC; and Michael J. Weeks Revocable Trust); Clear Energy, Ltd.; Allen Tim Meyer Trustee of the Allen Tim Meyer Revocable Trust; Joint Class Counsel Decl. at ¶¶96-102.

IV. CONCLUSION

For the foregoing reasons, Chieftain respectfully requests the Court enter an order granting approval of a Case Contribution Award of \$225,000.00.

Dated: February 26, 2018

Respectfully submitted,

s/ Bradley E. Beckworth

Bradley E. Beckworth
bbeckworth@nixlaw.com
Jeffrey Angelovich
jangelovich@nixlaw.com
Lisa Baldwin
lbaldwin@nixlaw.com
Trey Duck
tduck@nixlaw.com

NIX, PATTERSON & ROACH, LLP
3600 North Capital of Texas Highway
Suite 350, Building B
Austin Texas, 78746
(512) 328-5333
(512) 328-5335

Susan Whatley
swhatley@nixlaw.com
NIX, PATTERSON & ROACH, LLP
205 Linda Drive
Daingerfield, TX 75638
(903) 645-7333 telephone
(903) 645-4415 facsimile

Robert N. Barnes
rbarnes@barneslewis.com
Patranell Britten Lewis
plewis@barneslewis.com
BARNES & LEWIS, LLP
208 N.W. 60th Street
Oklahoma City, Oklahoma 73118
(405) 843-0363
(405) 843-0790

Michael Burrage
Mburrage@whittenburrage.com
WHITTEN BURRAGE
1215 Classen Dr.
Oklahoma City, OK 73103
(405) 516-7800
(405) 516-7859

Lawrence R. Murphy, Jr.
larrymurphy999@gmail.com
LAWRENCE R. MURPHY, JR., P.C.
624 South Boston, Floor 8
Tulsa, Oklahoma 74119

Rex A. Sharp
rsharp@midwest-law.com
Barbara Frankland
bfrankland@midwest-law.com
REX A. SHARP, P.A.
5301 West 75th St.
Prairie Village, KS 66208

(913) 901-0505
(913) 901-0419

Joseph R. Gunderson
Gunderson.joseph.r@gmail.com
GUNDERSON LAW, P.C.
321 W. Walnut St., Ste 300
Des Moines, IA 50309
(515) 865-4513

CERTIFICATE OF SERVICE

I hereby certify that I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send email notification of such filing to all registered parties.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: February 26, 2018.

s/ Bradley E. Beckworth
Bradley E. Beckworth